

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Remanded by Supreme Court September 17, 2007

JIMMY DALE HOGAN v. STATE OF TENNESSEE

Appeal from the Circuit Court for Lawrence County
No. 22971 Robert L. Jones, Jones

No. M2007-02104-CCA-RM-CD - Filed August 12, 2008

The petitioner, Jimmy Dale Hogan, appealed the denial of post-conviction relief from this court to our supreme court. After review, our supreme court remanded the appeal to this court for reconsideration, in light of Wiley v. State, 183 S.W.3d 317 (Tenn. 2006). After careful review, we conclude that trial counsel was ineffective for failing to seek a jury instruction on second degree murder as a lesser included offense of felony murder; therefore, we reverse the judgment of the post-conviction court and remand this matter to the trial court for a new trial on the petitioner's conviction for felony murder.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,
Reversed in Part, and Remanded**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Patrick G. Frogge, Nashville, Tennessee, for the appellant, Jimmy Dale Hogan.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; and T. Michel Bottoms, District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner was convicted of especially aggravated robbery, a Class A felony, and felony murder. He was sentenced to life for the felony murder conviction and to twenty years for the especially aggravated robbery conviction, with the sentences to be served consecutively. In his initial post-conviction appeal, the petitioner argued that: counsel was ineffective both at trial and on appeal; our supreme court violated the Tennessee Constitution in denying him investigative funds; and the trial court erred in failing to instruct the jury on lesser included offenses. Initially, this court affirmed the denial of the petition for post-conviction relief, but our supreme court granted the petitioner review and remanded the case to this court for reconsideration in light of Wiley v. State, 183 S.W.3d 317 (Tenn. 2006).

Our supreme court in Wiley concluded that trial counsel was deficient in failing to request an instruction on second degree murder and in failing to preserve the issue of jury instructions on appeal. There are many similarities between the instant case and Wiley. In both cases, the trial court failed to instruct the jury on second degree murder as a lesser offense of felony murder, and trial counsel did not raise the issue of jury instructions on direct appeal, thus failing to preserve the trial court's error for appeal.

This court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the petitioner so as to deprive him of a fair trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). The failure to prove either deficiency or prejudice justifies denial of relief; therefore, the court need not address the components in any particular order or even address both if one is insufficient. Goad, 938 S.W.2d at 370. In order to establish prejudice, the petitioner must establish a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

The test in Tennessee to determine whether counsel provided effective assistance is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; State v. Honeycutt, 54 S.W.3d 762, 769 (Tenn. 2001). Therefore, in order to prove a deficiency, a petitioner must show "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad, 938 S.W.2d at 369 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065).

In reviewing counsel's conduct, a "fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Nichols v. State, 90 S.W.3d 576, 587 (Tenn. 2002) (citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

After review, we conclude that counsel was deficient in failing to request jury instructions on lesser included offenses of felony murder and in failing to preserve the issue on appeal. At the time of the petitioner's offense, felony murder required a "reckless" killing in the perpetration of, or attempt to perpetrate, an enumerated felony, Tenn. Code Ann. § 39-13-202 (1991), and second degree murder required a "knowing killing of another" or "reckless killing" related to unlawful

distribution of enumerated drugs, Tenn. Code Ann. § 39-13-210 (1991). Further, at the time of the petitioner's trial, as in Wiley, the trial court was required to instruct the jury on second degree murder as a lesser offense under the decision in Trusty, 919 S.W.2d at 310. Although the trial court was required to instruct the jury on the lesser offense even without a request by counsel, trial counsel also failed to take any step toward preserving the issue for appeal.

The failure to instruct on the lesser included offenses of felony murder, as required at the time of the trial under Trusty, would have been reversible error on direct appeal had the issue of jury instructions been preserved. Therefore, counsel's deficiency was prejudicial. Accordingly, we remand for a new trial on the offenses of felony murder. The single incident of ineffective assistance of counsel was the failure to seek a jury instruction on second degree murder and has no effect on the petitioner's conviction for especially aggravated robbery.

Conclusion

Based on the foregoing and the record as a whole, we reverse the judgment of the post-conviction court and remand this matter to the trial court for a new trial on the petitioner's conviction for felony murder.

JOHN EVERETT WILLIAMS, JUDGE